

~~ORIGINAL~~

BEFORE THE MERIT EMPLOYEE RELATIONS BOARD  
OF THE STATE OF DELAWARE

COPY

IN THE MATTER OF:  
CARL McILROY

Grievant,

v.

STATE OF DELAWARE  
DEPARTMENT OF HEALTH AND  
HUMAN SERVICES (DHSS)

Agency.

DOCKET NO. 03-09-296

ORDER

BEFORE Brenda Phillips, Chairperson, and Board members Paul Houck, and John F. Schmutz, constituting a quorum of the Merit Employee Relations Board pursuant to 29 Del. C. §5908(a).

**APPEARANCES:**

For the Grievant:

Roy S. Shields, Esquire  
Brown, Shields, Beauregard &  
Chasanov  
108 E. Water Street  
P. O. Drawer F  
Dover, DE 19903

For the Agency:

Ilona Kirshon  
Deputy Attorney General  
Carvel State Office Building  
820 N. French Street  
Wilmington, DE 19801

**PROCEDURAL HISTORY**

This grievance was filed with the Merit Employee Relations Board ("MERB" or "Board") on September 29, 2003 by on behalf of Carl McIlroy after a Step 3 grievance decision dated September 9, 2003. The grievance concerns the alleged failure of the Agency to take steps to assure that the duties of the grievant's position were those which

were posted or contained within the job description. The position involved has been the subject of prior grievances by Mr. McIlroy as well being considered by the Delaware Superior Court. *McIlroy v. Department of Health and Social Services*, 2000 WL 703672 (Del. Super.)

In the present grievance, Mr. McIlroy asserts, among other things, that the Department has continually required performance of duties beyond the position classification and has refused to process reclassification requests or to seek reclassification of the position. The grievant claims that the duties which he is being required to perform in the position he occupies are more consistent with the classification of Investigative Administrator which is a pay grade 15 than with the duties of a Field Services Supervisor pay grade 13. This matter was scheduled for hearing before the Board on December 16, 2004. After hearing argument from the parties and upon consideration of the stipulation and agreement of the parties the Board dismissed the grievance as moot.

#### **MOTION TO DISMISS**

At the commencement of the hearing the hearing the Agency moved to dismiss Mr. McIlroy's grievance appeal on the basis that the Board lacked the jurisdiction to hear grievances relating to pay grades or to critical reclassification requests. The Board received argument from both parties on the motion to dismiss and considered a stipulated chronology of events pertaining to the classification of the position of Field Investigator Supervisor presently occupied by Carl McIlroy.

During the argument on the motion to dismiss it became apparent that the essence or heart of this grievance matter was the desire by Mr. McIlroy to have a request for

critical reclassification which was prepared at the Agency concerning this position after a prior grievance sent forward to the Office of State Personnel ("SPO") for final consideration. The parties disagreed about whether there was, under the circumstances of this case, any duty or obligation for the Agency to send forward to the State Personnel Office a request for a critical reclassification of the position held by Mr. McIlroy when the Agency was not in agreement that reclassification was appropriate. However, to resolve this matter, the Agency agreed that, in this instance, it would work with Mr. McIlroy to prepare and submit to the State Personnel Office position information to enable SPO to make a final determination of the proper classification of this position.

Since this resolution of Mr. McIlroy's grievance was satisfactory to him, the Board, on the basis of the stipulation and agreement of the parties as more particularly set forth in the transcript of the proceedings before the Board, determine the grievance was moot and that a decision on the Motion to Dismiss was unnecessary. On that basis the Board voted unanimously to dismiss the grievance and to request SPO to clarify and communicate to agencies and employees the process for consideration of critical reclassifications.

**RELEVANT MERIT RULES (references are to the rules as revised effective January 1, 2004).**

**RULE 3.1**

The Director shall establish and maintain a method of classifying and reviewing all positions. Positions substantially alike in duties and responsibilities and requiring essentially the same knowledge, skills and abilities shall be grouped into the same class and pay grade.

**RULE 3.2**

Employees may be required to perform any of the duties described in the class specification, any other duties of a similar kind and difficulty, and any duties of similar or lower classes. Employees may be required to serve in a higher position; however, if such

service continues beyond 30 calendar days, the Rules for promotion or temporary promotion shall apply, and they shall be compensated appropriately from the first day of service in the higher position.

### **RULE 3.3**

If a significant change is made in the duties and responsibilities of a position, or if there is an alleged position classification or reclassification error, the position shall be reviewed and reclassified if justified, in accordance with the procedures established by the Director consistent with the Budget Act.

### **DISCUSSION**

Mr. McIlroy's grievance raises questions concerning the obligation of an Agency and the Director to review the duties and responsibilities of a position in the classified service to determine consistency with the classification plan.

The Merit Rules contemplate a process whereby there will be periodic review of specific positions when there have been additional duties imposed or where the duties of the position have been otherwise significantly changed to include the removal of duties or responsibilities. Specifically, Merit Rule No. 3.3 contemplates the Director, on his or her own initiative or at the request of an appointing authority will conduct such a review. This Merit Rule also contemplates that the Director and the employing Agency will act in a timely manner when there have been significant changes to the duties of a position. While this Merit Rule is not designed to give each individual the ability to compel a critical reclassification review of his or her position each time the duties thereof are modified, the Rule should not be construed to allow the Agency to effectively "stone-wall" for its own purposes the employee's request that the duties of his or her position be examined for consistency with the position's classification.

Clearly, not every employee request seeking a critical reclassification review of his or her job duties can or should be honored. But it is equally clear that there are some

situations where position duties are changed and must be reported by the Agency and considered by the Director. The problem is how to differentiate between the meritorious and non-meritorious written employee requests. The gate keeper in this situation has traditionally been the employing Agency as it is the Agency which supports and sends the request for a critical classification forward to the Director. But what about the situation where the Agency fails or refuses to process a critical reclassification request? What is the recourse of the employee? One answer is that the employee can file a grievance asserting a violation of the Merit Rule which imposes the requirement on the Agency and the Director to make timely adjustments upon changed responsibilities. (See Merit Rule 3.2) This is the case whether or not the matter is placed beyond the jurisdiction of the Merit Employee Relations Board by the Budget Epilogue language.

Each year The Delaware General Assembly in the epilogue to the Budget Act makes it clear that it is not the function of the Merit Employee Relations Board to hear grievances concerning pay grade determinations or Critical Reclassification requests. (See, Senate Bill 320, 142<sup>nd</sup> General Assembly at page 72). This limitation on the jurisdiction of the Board does not however mean that an employee can not file a grievance against an appointing authority who fails or refuses to address an employee's legitimate concern that his or her position has significantly change in a manner which should be recognized under the Merit Rules such as Rules 3.0800 and 3.0810. It would be patently unfair for an Agency to keep an employee in a position with a classification which does not properly reflect the duties actually performed by the employee. Indeed, Merit Rule 3.0800 mandates that the appointing authority shall report such changes to the Director in such manner as the Director shall prescribe.

The Board suggests that the Director's prescribed manner for such reporting be published and conveyed with both clarity and consistency to Agencies and to employees. Furthermore, the Director must to insist that Agencies comply with such directions and good management practice would suggest that the employees receive a written response.

**ORDER**

The grievance appeal of Carl McIlroy in Docket No. 03-09-296 is dismissed as moot.

**BY ORDER OF THE BOARD:**

  
Brenda Phillips, Chairperson

  
John F. Schmutz, Member

  
Paul R. Houck, Member

**APPEAL RIGHTS**

29 Del. C. §5949 provides that the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof of any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court are to be filed within thirty (30) days of the employee being notified of the final action of the Board.

29 Del. C. § 10142 provides:

(a) Any party against whom a case decision has been decided may appeal such decision to the Court.

(b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.

(c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.

(d) The Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

March 8, 2005  
Mailing Date:

Distribution:

Original: File

Copies: Grievant's Representative

Agency's Representative

Board counsel